Ting Ung Tuang v Lau Tiong Ik Construction Sdn Bhd

HIGH COURT (SIBU) — SUIT NO 22–40 OF 2000
CLEMENT SKINNER J
20 MARCH 2001

Arbitration *— Stay of proceedings — Procedure — Plaintiff commenced recovery proceedings against defendant — Defendant filed fresh action to stay proceedings — Failure to enter defence so as not to jeopardize proceedings for stay — Whether judgment in default should be granted*

Civil Procedure *— Judgment — Default of defence — Conditional appearance entered — Dispute to be referred to arbitration — Defendant commenced fresh action to stay proceedings — Failure to enter defence so as not to jeopardize application to refer dispute to arbitration, whether good ground to defeat entering of judgment in default — Whether necessary before entering judgment in default of defence for liquidated demand to send draft to defendant for approval*

The defendant engaged the plaintiff as a sub-contractor to execute certain mechanical and installation works. The main contract contained an arbitration clause which required the parties to refer any dispute or difference that may arise between them to arbitration in accordance with the terms stated therein. In the course of undertaking the works, the plaintiff made claims for interim payment for works done but was not paid the same. Therefore, the plaintiff commenced proceedings for recovery thereof. In being served with the writ and statement of claim, the defendant took the view, inter alia, that a dispute had arisen between them and the plaintiff was entitled to refer it to arbitration. The defendant applied under O 12 r 6 of the Rules of High Court 1980 ('the RHC') for leave to be granted to a conditional appearance without prejudice to an application for an order that all further proceedings be stayed pursuant to s 6 of the Arbitration Act 1952 ('the Act'). The learned senior assistant registrar duly granted leave. The defendant entered a conditional appearance. The defendant subsequently commenced a fresh action by way of originating summons for a stay under s 6 of the Act. The plaintiff then sent a notice to the defendant informing them that unless a defence was served on behalf of the defendant in this action, judgment in default would be entered against the defendant. The defendant did not serve or filed a defence in response to the notice sent by the plaintiff as it did not want to be seen as having 'taken a step' in proceedings, which, according to the defendant would have prejudiced its application to stay these proceedings. The plaintiff entered judgment in default of appearance against the defendant under O 19 r 12 of the RHC. The defendant filed this application to set aside the judgment.

Held, dismissing the defendant's application with costs:

(1) The consequence of the defendant commencing a fresh action was that there was nothing on file to show that the defendant had, within 14 days of the filing of its conditional appearance, applied to set aside or stay these proceedings by reason whereof its conditional apperance had became unconditional thereby leaving open the way for the plaintiff to enter judgment in default of defence against it unless it served a defence on the plaintiff (see p 324C–D).

(2) Where the plaintiff's claim was for a liquidated demand only, and a defendant failed to deliver his defence thereto, the plaintiff becomes entitled by O 19 r 2(1) of the RHC to 'enter' judgment for the amount claimed. A judgment in default is a judgment which needs only to be drawn up and presented for entry, without any need for a draft having been filed for approval first; *Hasil Bumi Perumah Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 followed. Thus, there was no need for a plaintiff who wishes to enter a judgment on default of defence, to first send to the solicitors acting for that defendant a draft judgment for approval (see pp 325D, 326E, G–H).

(3) The explanation of the defendant that it did not file a defence as it did not want to be seen as having taken a step in proceedings, thereby jeopardizing its application to refer the dispute to arbitration only explained why no defence was filed; it did not explained why it allowed its conditional appearance to become unconditional or why it commenced a fresh action by way of originating summons. The dilemma faced by the defendant could have been avoided if an application had been filed to either stay these proceedings or set aside the same on the grounds that the court did not have jurisdiction in view of the agreement to arbitrate. In that way, if the plaintiff took objection to the application on the grounds anticipated by the defendant, arguments could have been presented to the court on the true scope, purpose and ambit of a conditional apperance under O 12 rr 6 and 7 of the RHC and then left it to the court to decide in the issue. However, in this case, it does not lie in the mouth of the defendant to accuse the plaintiff of having obtained his judgment through an abuse of process; there was in the court's view, none (see pp 327E, H–328A).

(4) It was not a ground of the defendant's application in applying to set aside this judgment that it had a defence on merits. It would be wrong to allow the defendant to rely in these submissions because if the defendant had raised it as a ground in its application, the plaintiff would have addressed the issue in the plaintiff's affidavit in opposition which he had not done as it was never relied on by the defendant as a ground. Even if it could be argued that the court was obliged to consider what the defendant

had said in its affidavit as a possible defence, the defendant had not discharged the onus on it in demonstrating that it had an arguable defence (see p 328D–F).

[**Bahasa Malaysia summary**

Defendan telah melantik plaintif sebagai sub-kontraktor untuk melaksanakan kerja-kerja mekanikal dan pemasangan yang tertentu. Kontrak utama mengandungi satu klausa timbangtara yang menghendaki pihak-pihak merujuk apa-apa pertikaian atau perbezaan yang mungkin timbul antara mereka kepada timbangtara menurut terma-terma yang dinyatakan di dalamnya. Semasa kerja-kerja dijalankan, plaintif telah membuat tuntutan untuk bayaran interim bagi kerja-kerja yang telah dibuat tetapi belum dibayar. Oleh itu, plaintif telah memulakan prosiding mendapat tuntutan tersebut. Setelah disampaikan writ dan pernyataan tuntutan, defendan berpandangan, antara lain, bahawa pertikaian telah timbul antara mereka dan plaintif layak untuk dirujuk kepada timbangtara. Defendan memohon di bawah A 12 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') agar kebenaran diberikan untuk satu kehadiran bersyarat tanpa prejudis terhadap satu permohonan untuk satu perintah di mana semua prosiding seterusnya digantung menurut s 6 Akta Timbangtara 1952 ('Akta tersebut'). Penolong kanan pendaftar yang arif telah memberikan kebenaran yang sewajarnya. Defendan telah memasuki satu kehadiran bersyarat. Defendan seterusnya telah memulakan satu tindakan baru melalui saman pemula untuk satu penggantungan di bawah s 6 Akta tersebut. Plaintif kemudiannya telah menghantar satu notis kepada defendan memaklumkan mereka bahawa kecuali jika satu pembelaan disampaikan bagi pihak defendan di dalam tindakan ini, penghakiman ingkar akan dmasukkan terhadap defendan. Defendan tidak menyampai atau memfailkan satu pembelaan berhubung notis yang dihantar oleh plaintif kerana ia tidak mahu dilihat sebagai telah 'mengambil langkah' dalam prosiding tersebut, yang mana, menurut defendan mungkin akan memprejudiskan permohonannya untuk menggantungkan prosiding-prosiding tersebut. Plaintif telah memasuki penghakiman ingkar kehadiran terhadap defendan di bawah A 19 k 12 KMT. Defendan telah memfailkan permohonan ini untuk mengetepikan penghakiman tersebut.

Diputuskan, menolak permohonan defendan dengan kos:

(1) Kesan daripada defendan memulakan satu tindakan baru adalah tiada terdapat apa-apa atas fail untuk menunjukkan bahawa defendan telah, dalam tempoh 14 hari setelah memfailkan kehadiran bersyaratnya, memohon untuk mengetepi atau menggantungkan prosiding; ini menyebabkan kehadiran bersyaratnya telah menjadi tidak bersyarat yang memberikan jalan

untuk plaintif memasuki penghakiman ingkar terhadapnya kecuali jika ia menyampaikan satu pembelaan ke atas plaintif (lihat ms 324C–D).

(2) Di mana tuntutan plaintif adalah untuk tuntutan jumlah tertentu sahaja, dan defendan telah gagal untuk menyampaikan pembelaan beliau, plaintif akan berhak melalui A 19 k 2(1) KMT untuk 'memasuki' penghakiman untuk jumlah yang dituntut. Satu penghakiman ingkar adalah satu penghakiman yang hanya perlu dibentuk dan dikemukakan untuk kemasukan, tanpa apa-apa keperluan untuk satu draf yang difailkan untuk kebenaran terlebih dahulu; *Hasil Bumi Perumah Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 diikut. Oleh itu, tidak perlu bagi plaintif yang berhasrat untuk memasuki satu penghakiman ingkar pembelaan tersebut, untuk terlebih dahulu menghantar kepada peguamcara bagi pihak defendan tersebut satu draf penghakiman untuk kebenaran (lihat ms 325D, 326E, G–H).

(3) Penjelasan defendan yang ia tidak memfailkan satu pembelaan kerana ia tidak ingin dilihat sebagai telah mengambil langkah dalam prosiding, oleh itu menjejaskan permohonannya untuk merujuk pertikaian kepada timbangtara, hanya menjelaskan kenapa tiada pembelaan telah difailkan; ia tidak menjelaskan kenapa ia membenarkan kehadiran bersyaratnya menjadi tidak bersyarat atau kenapa ia memulakan satu tindakan baru melalui saman pemula. Dilema yang dihadapi oleh defendan mungkin boleh diatasi jika satu permohonan telah difailkan sama ada untuk menggantungkan prosiding-prosiding tersebut atau mengetepikan yang sama atas alasan bahawa mahkamah tidak mempunyai bidang kuasa menurut perjanjian tersebut untuk mengadili. Dengan cara ini, jika plaintif membantah permohonan tersebut atas alasan yang dijangkakan oleh defendan, hujah-hujah tersebut mungkin boleh dikemukakan ke mahkamah berdasarkan skop, tujuan dan bidang yang sebenar berhubung satu kehadiran bersyarat di bawah A 12 kk 6 dan 7 KMT dan kemudian ia terpulang kepada mahkamah untuk memutuskan persoalan tersebut. Namun begitu, di dalam kes ini, ia tidak terletak pada defendan untuk menuduh plaintif yang telah memperoleh penghakiman beliau melalui satu penyalahgunaan proses; di mana pada pandangan mahkamah, tiada (lihat ms 327E, H–328A).

(4) Ia bukan satu alasan dalam permohonan defendan semasa memohon untuk mengetepikan penghakiman ini bahawa ia mempunyai satu pembelaan yang bermerit. Ia adalah salah untuk membenarkan defendan untuk bergantung kepada hujah-hujah tersebut kerana jika defendan telah menimbulkannya sebagai satu alasan dalam permohonannya, plaintif mungkin sekali telah mengutarakan persoalan tersebut dalam afidavit bantahan plaintif yang mana beliau tidak berbuat demikian kerana defendan tidak pernah bergantung kepadanya sebagai satu alasan. Walaupun boleh dihujahkan bahawa mahkamah wajib untuk

mempertimbangkan apa yang telah dikatakan oleh defendan dalam afidavitnya sebagai satu pembelaan yang mungkin, defendan tidak melepaskan bebannya dengan menunjukkan bahawa ia mempunyai satu pembelaan yang boleh dihujahkan (lihat ms 328D-F).]

Notes

For cases on stay of proceedings generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.
For cases on judgment in default of defence, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3265–3275.

Cases referred to

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)
Kewangan Bersatu Bhd v Yap Ah Yit & Ors [1999] 1 CLJ 429 (refd)

Legislation referred to

Arbitration Act 1952 s 6
Rules of the High Court 1980 O 1 r 4, O 5 r 3, O 12 r 6, r 7(1), (2), O 19 rr 2, 3, 9, O 42 rr 8(1), 10(4), (5)
Sarawak Advocates (Practice and Etiquette) Rules 1988 r 56

Wong Ho Leng (*Wong Ho Leng & Co*) for the plaintiff.
Paul Liong (*Liong & Co*) for the defendant.

Cur Adv Vult

Clement Skinner J:. I had earlier dismissed the defendant's application to set aside a judgment in default of defence entered against it on 7 August 2000. I now give my reasons for doing so.

The defendant engaged the plaintiff as a subcontractor to execute certain mechanical and electrical installation works ('the works') for the extension to the Premier Hotel at Sibu, Sarawak. The plaintiff's appoinment as sub contractor is evidenced by a letter of acceptance dated 3 January 1997, which states, inter alia, that 'the conditions of main contract, wherever applicable, shall form part of the subcontract documents'. The general conditions of the main contract contained an arbitration clause (numbered 34) which requires the parties to refer any dispute or difference that may arise between them to arbitration in accordance with the terms stated therein.

In the course of undertaking the works, the plaintiff made claims for interim payment in the sum of RM393,439.38 for works done by way of progress claims, but was not paid the same by reason whereof he commenced these proceedings on 14 April 2000.

On being served with the writ and statement of claim, the defendant took the view, inter alia, that it was not in breach of the terms of the

subcontract agreement, and that a dispute had arisen between it and the plaintiff which it was entitled to refer to arbitration, pursuant to cl 34 of the general conditions of contract.

Accordingly, on 14 June 2000, the defendant applied under O 12 r 6 Rules of the High Court 1980 (the 'RHC') for the following order: that leave be granted to file conditional appearance without prejudice to an application for an order that all further proceedings in this action be stayed pursuant to s 6 of the Arbitration Act 1952 ('the Act').

The senior assistant registrar duly granted leave to the defendant in the terms sought for. On 19 June 2000, the solicitors, who were then acting for the defendant, informed the plaintiff's solicitors by letter about the defendant's application for leave to enter conditional appearance.

On 23 June 2000, the defendant entered a conditional appearance in this action, and the memorandum it filed reads as follows:

> Enter conditional appearance for Lau Tiong Ik Construction Sdn Bhd (company no 35382-T) without prejudice to an application for an order to set aside the writ.

The memorandum also bears an endorsement in the following terms:

> This appearance is to stand as unconditional unless the defendant applies within 14 days to set aside the writ or service thereof, and obtains an order to that effect.

I pause here to make the following observations. Although the defendant had applied for leave to enter conditional appearance so that it could apply for a stay of these proceedings to enable it to refer its alleged dispute with the plaintiff to arbitration, the memorandum of conditional appearance it filed states that the purpose for such an appearance was to apply to set aside the writ. The affidavit filed by the defendant in support of its application does not contain an explanation for the disparity.

It should next be noted that when a defendant has been granted leave to enter conditional appearance, and had done so, to preserve the conditionality of that appearance, he must proceed in accordance with O 12 r 7 RHC. Sub-r (1) thereof requires that a defendant must, within 14 days of entering conditional appearance, apply to the court for an order setting aside the writ or service thereof, or notice of the writ, or apply for the other declaration mentioned therein. Sub-r (2) then prescribes the mode of making such an application, and is in the following terms:

> An application under this rule must be made by summons.

Now, the RHC makes a distinction between a summons in chambers and an originating summons. Order 1 r 4 defines an originating summons as 'every summons other than a summons in a pending cause or matter'. Order 5 RHC regulates the mode of beginning civil proceedings in the High Court, and by rule 1, provides that 'subject to the provisions of any written law and these rules', civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition. Order 5 r 3 goes on to state that proceedings may be begun by originating summons, but

expressly provides that the rules do not apply to an application made pending proceedings. By virtue of the fact that the writ herein had already been issued and served, it constituted a 'pending cause or matter' within the definition set out in O 1 r 4. Therefore, if O 12 r 7 and the above rules are to be complied with, as the defendant wished to either obtain a stay or set aside a writ in a pending cause or matter, it needed to apply by way of a summons in chambers in these proceedings to do so.

Reverting to the facts, instead of applying by way of a summons in chambers in these proceedings as indicated above, the defendant on 4 July 2000 commenced a fresh action by filing an originating summons which was numbered 24–87–2000, applying for a stay in the fresh action, of these proceedings, under s 6 of the Act. There is again, no explanation from the defendant as to why it chose to proceed in this way.

The consequence of the defendant commencing a fresh action instead of applying in these proceedings to either stay or set the same aside, is this: there was nothing on file to show that the defendant had, within 14 days of the filing of its conditional appearance, applied to set aside or stay these proceedings by reason whereof its conditional appearance had become unconditional, thereby leaving open the way for the plaintiff to enter judgment in default of defence against it, unless it served a defence on the plaintiff. That explains why, on 11 July 2000, the solicitors for the plaintiff sent a notice pursuant to r 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 ('the 1988 Rules') to the solicitors for the defendant informing them that unless a defence was served on behalf of the defendant in this action, judgment in default would be entered against the defendant.

The defendant did not serve or file a defence in response to the notice sent to it by the plaintiff's solicitors, as it did not want to be seen as having 'taken a step' in the proceedings, which, according to the defendant, would have prejudiced its application to stay these proceedings.

In the absence of a defence having been served or filed in this action, the plaintiff on 7 August 2000, entered judgment in default of defence against the defendant under O 19 r 2 RHC, whereafter a copy of the judgment was served on the defendant's solicitors. On 18 August 2000, the defendant filed this application to set aside the said judgment.

In applying to set aside the default judgment herein, the defendant relies only on one ground, namely, that the judgment is irregular and must, therefore, be set aside *ex debito justitiae*. Counsel for the defendant gave two reasons for saying that the judgment was irregular: (a) the plaintiff's solicitors had not sent to the defendant's solicitors a draft judgment for approval before the judgment in default was entered. In support of this proposition, counsel cited *Kewangan Bersatu Bhd v Yap Ah Yit & Ors* [1999] 1 CLJ 429; and (b) the judgment had been obtained as a result of an abuse of process, in that the plaintiff had persisted in entering judgment despite his knowledge that the defendant wished to refer the dispute to arbitration and had applied for a stay of these proceedings for that purpose.

I now consider each of the defendant's contentions and begin by asking: in a case such as this, where the plaintiff's claim against a defendant is for a

liquidated demand only, and that plaintiff has duly warned the solicitors acting for the defendant that judgment in default will be entered against the defendant if he does not file a defence, but whose warning is ignored, is such a plaintiff required firstly to send to the defendant's solicitors a draft judgment for the latter's approval before entering judgment against the defendant?

According to counsel for the defendant, O 42 r 8(1) RHC imposes on the plaintiff a statutory obligation to do so; failure to comply therewith renders the judgment irregular and liable to be set aside *ex debito justitiae*. In support, the case of *Kewangan Bersatu Bhd v Yap Ah Yit* was cited.

Counsel for the defendant also submitted that there are good reasons of policy for requiring a plaintiff to send a draft judgment to solicitors acting for a defaulting defendant — it would 'give further notice and alert counsel who is sleeping on the file to do something' so that the court's time and expenses would not be wasted in having to deal with an application to set aside any judgment that may have been so obtained.

I regret I do not agree with either of the above contentions.

Where the plaintiff's claim is for a liquidated demand only, and a defendant fails to deliver his defence thereto, the plaintiff becomes entitled, by the provisions of O 19 r 2(1) RHC, to 'enter' final judgment for the amount claimed. And so, it might be asked: how does the plaintiff go about 'entering' that final judgment, and, is he required to first draw up a draft judgment before doing so? If he is not required to do so, then obviously there would be no need to send a draft copy to the defendant's solicitors for approval. Those questions have been authoritatively answered by the Supreme Court in the case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312. In that case, the appellant had served its statement of claim on the respondent who appeared but did not serve a defence within the time allowed by the rules. The solicitors for the appellant then served on the respondent's solicitors the usual 48 hours' notice requiring a defence to be served. The respondent's solicitors sought an extension of three weeks to do so, but nevertheless filed a defence on 26 March 1991 (but outside the 48 hours). Some three weeks later, on 19 April 1991, the appellant entered judgment in default of defence against the respondent but the judgment itself was backdated by the senior assistant registrar (the 'SAR') to 23 March 1991. The reason for the backdating was this: the appellant had filed a draft judgment for the approval of the SAR on 23 March 1991, once approved, the appellant then prepared a fair judgment and presented it for entry at the registry on 19 April 1991, but the SAR backdated the judgment to 23 March 1991, being the date when the draft judgment was first filed for approval. On appeal to the judge, it was held that the SAR was wrong to backdate the judgment to 23 March 1991. Its proper date should have been 19 April 1991 when it was presented for entry at the registry, but, as by that date a defence had already been filed and served, the judgment should not have been entered at all.

The appellant appealed to the Supreme Court. The issue before the court was whether the judgment dated 23 March 1991, but which had been

presented for entry at the registry only on 19 April 1991, was an irregular judgment and thereby liable to be set aside. The appellant contended that the date when the draft judgment was filed for approval was the date when it was 'entered' because according to counsel, O 42 r 10(4) and (5) made it clear that an order had to be 'drawn up' before being 'entered' — 'drawing up' being the physical preparation of the draft order and 'entering' being the filing of the draft order. To resolve the issue before it, it became necessary for the Supreme Court to consider what constituted 'entering' a judgment and whether a draft judgment needed to be filed in a default situation.

In dismissing the appeal, this is what his Lordship Jemuri Serjan CJ (Borneo) who was speaking for the Supreme Court said (at p 319):

> In our view, in a case under O 19 r 3, as is the case in this appeal, there is no statutory obligation on the part of the solicitors for the appellant to file a draft judgment which is required only in a case under O 42 r 8. What was done here was *ex abundanti cautela*. The relevant rule applicable in the instant case is r 10(1), (2) and (3). The solicitors for the appellants need only to draw up the judgment under r 10(2) and present it to the senior assistant registrar for entry and, under r 10(1), the senior assistant registrar should enter it in the cause book kept for that purpose.

Quite clearly then, the Supreme Court distinguished between judgments and orders which needed to be drawn up in draft first pursuant to O 42 r 8, and judgments which only need to be drawn up and presented at the registry for entry in the cause book. The Supreme Court identified a judgment in default of defence (under O 19 r 3) as a judgment which needs only to be drawn up and presented for entry, without any need for a draft having to be filed for approval first.

Although the Supreme Court was there dealing with a case concerning a default judgment under O 19 r 3 (for unliquidated damages), what was stated in that case would apply with equal force to a situation under O 19 r 2, because whether a plaintiff's claim is for a liquidated demand only or for unliquidated damages, in both instances, once a defendant makes default in serving a defence, the plaintiff becomes entitled to 'enter' final judgment (under O 19 r 2) or interlocutory judgment (under O 19 r 3), and whether it is final, as opposed to a interlocutory judgment that is being 'entered', the procedural steps to do so remain the same — and what these procedural steps are have been stated by the Supreme Court. I gratefully follow and give effect to it. The question I had first posed must, therefore, be answered in the negative: there is no need for a plaintiff who wishes to enter judgment in default of defence to first send to the solicitors acting for that defendant a draft judgment for approval, before doing so.

In *Kewangan Bersatu Bhd v Yap Ah Yit & Ors*, the learned judge refused to follow the decision of the Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd*, and instead distinguished it on the grounds stated by him. For the reasons I have already given, I respectfully decline to take that course.

With regard to the submission of counsel for the defendant that as a matter of policy, I should rule that in a default situation, a plaintiff must

send a draft judgment to the solicitors acting for a defendant so as to alert counsel who is 'sleeping on the file to do something', the short answer to that submission is that the policy considerations are more than met by the rule of etiquette found in r 56 of the 1988 Rules, which requires a solicitor acting for a party to give the solicitor acting for the other party 48 hours' notice before entering judgment in default.

I next consider whether the judgment in default had been obtained as a result of an abuse of process, as alleged by the defendant.

From the facts before the court, it cannot be said that the plaintiff had abused the process of court. The unfortunate position in which the defendant finds itself in is entirely of its own making. It had obtained leave to enter a conditional appearance and did do so; thereafter it was for the defendant to take such steps as was necessary to preserve the conditionality of its appearance by making, in these proceedings, the application it intended to make in accordance with O 12 r 7 RHC. Instead of doing so, the defendant commenced a fresh action by way of an originating summons in which it sought to stay these proceedings in that action. I have looked for an explanation in the affidavits filed by the defendant as to why the defendant had allowed its conditional appearance to become unconditional and why it was necessary for the defendant to commence a fresh action to apply for a stay of these proceedings, but have found none. I do realize that the defendant has, in para 3 of the affidavit affirmed by Law Choon King, explained that it did not file a defence as it did not want to be seen as having taken a step in these proceedings, thereby jeopardizing its application to refer the dispute to arbitration. However, that only explains why no defence was filed: it does not explain why it allowed it conditional appearance to become unconditional, or why it commenced a fresh action by way of its originating summons. During submissions, counsel for the defendant did venture an explanation from the Bar table. He indicated that the lawyer who was formerly handling the defendant's case was faced with a dilemma – he (the former lawyer) had taken the view that a person entering a conditional appearance can only apply to set aside the writ or service thereof, or challenge the jurisdiction of the court, but cannot, because of the way O 12 r 7 is worded, apply for a stay of proceedings. Now, if that was the reason why the defendant had allowed its conditional appearance to become unconditional, and also why it had filed its originating summons, then the lawyer who had so decided, or at least the defendant's representative, should have given that explanation in an affidavit instead of the explanation being given through counsel in chambers or in written submissions which I cannot accept or act on.

If it is of any assistance to counsel, the dilemma faced by the defendant could have been avoided if an application had been filed to either stay these proceedings or set aside the same on the grounds that the court did not have jurisdiction in view of the agreement to arbitrate. In that way, if the plaintiff took objection to the application on the ground anticipated by the defendant's former lawyer, arguments could have been presented to the court on the true scope purpose and ambit of a conditional appearance under O 12 r 6 and 7 RHC, and then left it to the court to decide on the

issue. But the defendant has decided for itself what the law was and has committed itself to a course by which it is now bound. A

In the circumstances, I find that it does not lie in the mouth of the defendant to accuse the plaintiff of having obtained his judgment through an abuse of process: there was, in my view, none.

The judgment herein, having been obtained in accordance with the rules, it is regular. The court is, by O 19 r 9 RHC, vested with a discretion to set aside such a judgment, but for that discretion to be exercised in favour of the defendant, it would need to: (i) offer a reasonable explanation as to why it allowed judgment to be entered against it; and even more importantly, (ii) demonstrate that it had a defence on the merits. As to (i) above, the defendant has explained why it did not file a defence, but it should be realized that a defence need not have been filed in the first place if the defendant had, in accordance with the leave granted to it, filed in these proceedings, its intended application (whatever it was) to preserve the conditionality of its appearance. However, there is no explanation on this crucial point of why it did not do so. Without an explanation, there is no material upon which discretion can be exercised in favour of the defendant. As to (ii) above, it is not a ground of the defendant's application in applying to set aside this judgment that it has a defence on the merits. Counsel for the plaintiff has submitted that it would be wrong to allow the defendant to now rely on this ground in submissions because if the defendant had raised it as a ground in its application, the plaintiff would have addressed the issue in the plaintiff's affidavit in opposition, which he has not done as it was never relied on by the defendant as a ground. I find merit in this submission. The defendant not having relied on it as a ground in bringing this application is precluded from taking this point in submissions. B C D E

Even if it can be argued that I am obliged to consider what the defendant has said in its affidavit about a possible defence, I find the defendant has not discharged the onus on it of demonstrating that it has an arguable defence. The defendant has, in a cursory and off-handed manner, 'pointed-out' in para 3 of its affidavit that the plaintiff's claim is invalid because his claims for interim progress payments were not certified by both the architect and defendant, as required by cl 30 of the general conditions of contract. During submissions, counsel did not request me to look at cl 30 of the general conditions of contract. If he had done so, he would have found it consisted of eight sub-clauses, each with its own sub-sub-clauses. In my judgment, the court is not obliged to sift through the various sub-clauses and sub-sub-clauses, which make up cl 30, to first decide which of them the defendant seeks to rely on as affording it a defence and then go on to try to see for myself why it would afford a defence to the plaintiff's claim, that is for the defendant to do, so that the court may decide whether or not what is relied upon does in fact raise an arguable defence. F G H

Counsel for the defendant did, however, say that the whole dispute between the plaintiff and the defendant is laid out in 'exh L5' to Law Choon King's affidavit. When that exhibit is looked at, it consists of two documents, both of which relate to the defendant's claim for liquidated and I

ascertained damages against the plaintiff for alleged late completion of the works, but there is not a word in this exhibit about the alleged defence of non-certification of progress payments which the defendant intends to rely on by way of defence. In the result, the defendant had not demonstrated that it had an arguable defence.

In the premises, there was no basis on which I could exercise discretion to set aside the judgment which had been regularly obtained. In the event, I dismissed the defendant's application with costs.

Defendant's application dismissed.

Reported by Wong Siok Chin